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## Essay

### The Well-Intentioned Purpose but Weak Epistemological Foundation of Originalism

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*The attraction of an originalist approach to constitutional interpretation is understandable. It is maintained that only that method can provide the judicial objectivity and certainty that constitutional adjudication requires. They claim that the traditional common-law evolutionary approach leads Supreme Court Justices to succumb to the temptation to fill in gaps in constitutional law and thereby ignore that major expansions in constitutional meaning and should be made in the way the Founders envisioned, namely by amendment of the Constitution. However difficult or impractical that process may be, it is the only way to avoid the politicization of the Court. Whether that goal is achievable is highly unlikely, as is shown by the large number of five-to-four decisions of the Court. The original understanding is often hotly contested and, as shown in this Essay, often inconsistently applied. It is naïve to expect that, once the Court claims to have discovered the original understanding, a future Court would not disagree.*

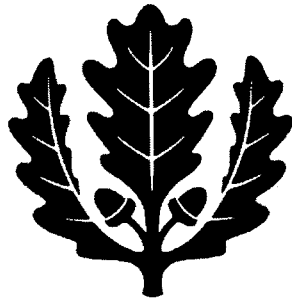
*Significant members of the founding generation realized that, in the process of interpreting and applying the Constitution, its meaning would evolve, even in ways that were contrary to the expectations of the Founders, and this is what has happened. In trying to halt and even overturn those developments, originalists have also failed to consider that the founding generation was concerned with more than the semantics of the Constitution as if it were a secular scripture.*

*As is argued in this Essay, the Founders also had understandings about what was the comparative importance of its clauses in case of conflicts. In adopting the Constitution their ultimate purpose was to create a lasting political society. It is hard to believe that they would accept economic*

*collapse or civil unrest for what some judges believed was textual faithfulness.*

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# The Well-Intentioned Purpose but Weak Epistemological Foundation of Originalism

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## I. THE ATTRACTION OF ORIGINALISM

It is certainly understandable that a thoughtful person might champion an approach to constitutional interpretation that is based as much as possible on the original understanding of the Founding Fathers, or the generation of which the Founders were a part, to discover the meaning of the text of the Constitution. Despite the difficulty of reconstructing the mindset of an amorphous late eighteenth century elite, a rational person might nevertheless still believe that only by referring to the public meaning of the text of the Constitution at the time of its adoption can constitutional adjudication achieve not only objectivity, but also the maximum possible certainty. The need for as much objectivity as possible in judicial decision-making is obvious. So is the need for certainty, to the maximum extent attainable, because the law must be clear enough and consistently applied to provide both the guidance that officials need in order to discharge their official responsibilities and the predictability that ordinary citizens need to arrange their lives and affairs. But it should also be obvious that, given the complexity and dynamic quality of social life, no fixed set of established rules and practices is comprehensive enough to regulate all the present and future activities and responsibilities of officials or citizens. There is always a residual need for human beings to exercise some degree of discretion, or what the ancients called “practical wisdom” or “prudence.” The more important a person’s role and activities, particularly as they relate to interactions with other people, the more important it is that the exercise of that discretion be guided by practical wisdom. Originalism tries to establish the parameters within which the exercise of judicial discretion must be conducted. How well that endeavor can succeed in achieving this goal is another matter.

Dictionaries provide several meanings for the word “discretion.”<sup>1</sup> Two

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<sup>1</sup> E.g., *Discretion*, BLACK’S LAW DICTIONARY (8th ed. 2004) (“1. Wise conduct and management; cautious discernment; prudence. 2. Individual judgment; the power of free decision-making.”); J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY 260 (1987) (defining discretion as “[l]iberty

overlapping meanings figure in legal discourse.<sup>2</sup> One of these focuses on the normative features of the term.<sup>3</sup> For example, a mature adult is someone who has reached the age of discretion. Such a person can be expected to make good choices about the appropriate things to do or say when confronted with situations that require making important decisions. The other, and much more frequent, use of the term discretion in legal discourse focuses principally on the activities of judges and other officials.<sup>4</sup> The essence of this usage is that people granted discretion to make decisions under conditions of uncertainty are accountable for the choices they make to those who have granted them the authority to exercise that discretion.<sup>5</sup> Under the first, more normative use of the term, people who make bad choices may be said to show “poor” discretion for which they may bear some moral responsibility in the eyes of others, but they are not necessarily accountable to others for the choices they have made. Under the second meaning, whose key feature is accountability to others, it makes sense to say that decision-makers have engaged in an “abuse” of discretion when they exceed the authority they have been granted, even if they have made what most people would accept was the better choice from the moral point of view. The goal of originalists is to prevent judges, in well-intentioned attempts to conform the Constitution to contemporary conditions, from abusing the discretion that the body-politic has delegated to them.<sup>6</sup>

Judges are par excellence examples of officials who are responsible to their society for the consequences of their decisions. That is why many judges might prefer a legal regime that narrowly limits their range of discretion and makes it easier for them to transfer the moral responsibility for their decisions to the law, such as would be the case if a statute were in question.<sup>7</sup> A trial judge, for example, might feel particularly uneasy if he were granted a broad range of decisional authority in a controversial case and force him to accept a

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to act according to one’s own ideas of right; the liberty of adapting one’s conduct to circumstances; the exercise of judgment”).

<sup>2</sup> George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 747 (1986).

<sup>3</sup> See *id.* at 751 (discussing discretion as prudence in decision-making).

<sup>4</sup> *Id.* at 752.

<sup>5</sup> *Id.*

<sup>6</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–60 (1990) (arguing that Supreme Court departures from the original meaning of the Constitution are not democratically correctable and alter the design of the American Republic); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY* 37–47 (Amy Gutmann ed., 1997) (noting that Evolutionists “take the power of changing rights away from the legislature and give it to the courts”).

<sup>7</sup> This subject and the related issue of academics advising courts in broad terms because they did not want to bear the responsibility for the judicial application of their advice is discussed in George C. Christie, *Some Reasons Courts Have Become Active Participants in the Search for Ultimate Moral and Political Truth*, in *COMPARATIVE LAW AND . . .* 315, 316–17 (Alexis Albarian & Olivier Moréteau eds., 2016).

greater than usual moral responsibility for his decision.<sup>8</sup> Such a judge would be aware that the decision might be overturned and its rationale rejected by appellate courts as well as subject to criticism by members of the legal profession. Even judges sitting on the highest courts are aware that their exercise of broad discretion in controversial cases will be open to criticism from legal academics, and sometimes from the public at large, for stretching their discretion too far. Nevertheless, judges can also be open to criticism for not being bolder in the exercise of their discretion. It is common knowledge that judges often avoid moral responsibility for decisions that many people would consider morally dubious by declaring that, much as they tried to reach a more morally acceptable decision, “the opinion just wouldn’t write,”<sup>9</sup> and they were therefore required to follow existing law, even if that law was unwise or morally suspect. For example, a panel of the Fourth Circuit upheld a district court’s refusal to allow a defendant who had pleaded guilty to withdraw her plea because she had not been provided with sentencing guidelines before she entered her plea.<sup>10</sup> In doing so, the panel declared that, while “sympathetic to the concerns of defense counsel, we are constrained by existing law.”<sup>11</sup> In a more recent case in the Tax Court, a grandmother who had been the principal support of her grandchildren who were living with her, the court upheld a ruling of the Commissioner of Internal Revenue to recover tax refunds and credits because her son and daughter-in-law had already claimed them and used the proceeds to buy drugs.<sup>12</sup> The law also serves to relieve government officials of responsibility for good faith mistakes in exercising their authorized discretionary duties<sup>13</sup> and the same for jurors.<sup>14</sup>

Sometimes a court may be reluctant even to accept the moral responsibility for hearing politically explosive cases. There are well known instances in which the Supreme Court has stretched its authority to control its docket to avoid hearing obviously meritorious and important cases by declaring that those cases were devoid of a properly presented federal

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<sup>8</sup> *Id.* at 316.

<sup>9</sup> Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 791 (1981).

<sup>10</sup> *United States v. Puckett*, 61 F.3d 1092 (4th Cir., 1999).

<sup>11</sup> *Id.* at 1099.

<sup>12</sup> *Smyth v. Comm’r of Internal Revenue*, 113 T.C.M. (CCH) 1132 (T.C. 2017). The court declared that “except to say that we are bound by the law ... it is impossible for us to convince ourselves that the result we reach today ... is in any way just.” *Id.* at 5.

<sup>13</sup> See e.g., *Butz v. Economou*, 438 U.S. 478 (1978).

<sup>14</sup> JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 48, 94–95, 122–234, 160–63, 186 (2008). Whitman presents very creditable evidence that the “reasonable doubt” test was in large part adopted to allow judges and jurors to overcome their fear that they might be damned, if they condemned an innocent defendant to death, by transferring their moral responsibility to the law.

question or lacked a substantial federal question.<sup>15</sup>

Obviously, the ability of the law to remove the moral or political responsibility of a decision from judges depends on the clarity of the governing law. In areas of law where the social objectives are narrow in scope and a high degree of certainty and predictability is the paramount objective—as in the law governing title to property, or insurance, or even some areas of tort law—it is not surprising that judges feel more comfortable with so-called bright-line legal doctrines, established by statute or by a series of judicial decisions, that reduce much of the inevitable ambiguity and vagueness of all legal directives.<sup>16</sup> At the other end of the spectrum, cases involving more general legal language and more numerous competing values understandably present a source of discomfort to decision-makers.<sup>17</sup> That is certainly true in many of the cases that are the focus of the current controversies over the appropriate approach to construing the Constitution. The need to relieve judges of that burden—and particularly to restrain as much as possible Supreme Court Justices from succumbing to the temptation to fill those gaps in constitutional adjudication—motivates the advocates of originalism.

An advocate for an originalist approach to constitutional adjudication might accept that the common-law approach to legal reasoning is objective because judges take seriously their obligation to be objective and accept the constraints imposed on their discretion by the doctrine of *stare decisis*, which puts great emphasis on consistency. But it is argued that this approach is not adequate for constitutional adjudication because by allowing the gradual evolution of legal doctrine to accommodate social changes, it does not provide the greater certainty required to uphold the legitimacy of constitutional adjudication.<sup>18</sup> For an originalist, the text of the Constitution, when its meaning is ascertainable, overrides any other consideration and

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<sup>15</sup> The most famous of such cases is *Naim v. Naim*, 90 S.E. 2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956), which was severely criticized in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). *Naim* involved a challenge to the Virginia anti-miscegenation statute. In turn, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 49–65, 70–72 (1st ed. 1962), strongly supported the Court's use of that tactic in these particular situations. Bickel's point was that the Court had enough on its hands while it was trying to enforce *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Baker v. Nelson*, 409 U.S. 810 (1972), the Court used the same tactic to avoid ruling on a same-sex marriage ban.

<sup>16</sup> See Frederic R. Coudert, *Certainty and Justice*, 14 YALE L.J. 361, 363 (1905) (discussing the natural comfort associated with a fair degree of certainty and how that created judicial custom).

<sup>17</sup> See Philip Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196–99 (1977) (“The first intuition is that the goal of the judge, however unobtainable or unrealistic in practice, is ideally to ‘find’ rather than to ‘make’ the law.”).

<sup>18</sup> See Mary Wood, *Scalia Defends Originalism as Best Methodology for Judging Law*, U. VA. SCH. L. (Apr. 20, 2010) [https://www.law.virginia.edu/news/2010\\_spr/scalia.htm](https://www.law.virginia.edu/news/2010_spr/scalia.htm) (“All these questions pose enormous difficulty for non-originalists, who must agonize over what the modern Constitution ought to mean with regard to each of these subjects, and then agonize over the very same questions five or [ten] years later, because times change[.]” (quoting J. Scalia)).

leaves no room for the exercise of judicial discretion.<sup>19</sup> That is to say, the Constitution should be treated as something approaching a religious text whose precepts are unchangeable, with the caveat that, unlike such a text, the Constitution does provide a process for its amendment.

The epistemological foundation of the originalist approach is the claim that it is bottomed on historical facts and on the assumption that, once that original understanding is discovered, it will be fixed for all time.<sup>20</sup> That approach to constitutional adjudication ignores that the original understanding of the meaning of the Constitution is often a highly contested matter even among originalists with differing views on how much discretion the original public meaning of the Constitution allows courts to exercise in order to accommodate precedent, government practice, or changing social conditions.<sup>21</sup> There certainly has often been disagreement among Supreme Court Justices about what we should understand the Founders to have meant in drafting the text of the Constitution.<sup>22</sup> It is not only religion that is prone to “reformation.” That is why it was not disingenuous of Justice Kagan to have asserted at her confirmation hearings in 2010 that, despite the sharp differences among the Justices in recent years, “we are all originalists.”<sup>23</sup>

Such differences are inevitable even if one only focuses on the often hotly disputed issue of what was the shared understanding of the founding generation on the meaning of the terms used in the Constitution. Differences became more inevitable if one considers the other important factors that must be considered when interpreting the Constitution. As acknowledged by many originalists, the members of the founding generation also held views

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<sup>19</sup> It has been noted in recent scholarship that Justices searching for the correct interpretation of the meaning of the Constitution often maintain that the custom of giving greater weight on the importance of stare decisis when statutory interpretation is involved should be rejected if that statutory interpretation is not the “correct” one. See Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 202–14 (2018) (discussing the willingness of the Court’s textualist Justices to abandon stare decisis and argue in favor of overruling established statutory interpretation precedents).

<sup>20</sup> See Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 78, 81 (2016) (discussing how originalism is an objective and dispassionate reporting on the past).

<sup>21</sup> See *id.* (discussing the theoretical construction of original public meaning). For a more general discussion of the widespread use of construction in legal discourse, see GEORGE C. CHRISTIE, *THE NOTION OF AN IDEAL AUDIENCE IN LEGAL ARGUMENT* 26 (2000). See also William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015) (arguing that originalism should be understood inclusively, and that our current constitutional practices demonstrate a commitment to inclusive originalism). Important earlier articles discussing the variation of originalism theory include Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 749–50 (2011); Christopher R. Green, *“This Constitution”*: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1621–31 (2009).

<sup>22</sup> See Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1019 (2018) (“Supreme Court [J]ustices have fundamentally competing perspectives regarding the best approach to constitutional interpretation.”).

<sup>23</sup> *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan). One might say that original meaning is a construct.



on the social, moral, and political issues that come into play in deciding difficult questions of constitutional interpretation.<sup>24</sup> These worldviews would include not only prejudices but also shared expectations about the future—for example, that the United States would continue to be a Christian country and overwhelmingly Protestant.<sup>25</sup> Some of the founding generation would have assumed that the future, although inevitably subject to some change, would still look pretty much like the present, whether they liked that present or not. It is a factor that figured in the controversies over “internal improvements”<sup>26</sup> that characterized pre-Civil War politics and still figures in contemporary controversies over the reach of the federal government under the Commerce Clause. Other members of the founding generation may have taken a more expansive view of the future, for better or for worse.<sup>27</sup> The founding generation also had ideas, expectations, and hopes about how the Constitution should or would be construed by the judiciary and how conflicts between competing terms and clauses of the Constitution would be resolved when it was impossible to be faithful to each of the competing terms or clauses. Would the Founders have shared beliefs about the relative importance of the conflicting terms or clauses? Finally, in interpreting the Constitution, one would certainly need to consider what the founding generation understood to be the purpose of the Constitution they were adopting.<sup>28</sup>

If one refuses to expand one’s vision to include all these aspects of constitutional interpretation, one must face up to the problem of dissents, which, if common, give traction to the allegation that controversial judicial decisions are inevitably influenced by the ideological preferences of judges.<sup>29</sup> One way many jurisdictions have dealt with the problem of dissents

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<sup>24</sup> See, e.g., Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017) (explaining how originalism is not fundamentally about texts, but rather original meanings).

<sup>25</sup> See JOHN CORRIGAN & WINTHROP S. HUDSON, *RELIGION IN AMERICA* 35 (8th ed. 2010) (addressing the Protestant predominance in the English Colonies). For a discussion of the continued judicial recognition of the United States as a Christian nation until the mid-twentieth century, see Paul Finkleman, *Concept of “Christian Nation” in American Jurisprudence*, in 1 *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 343, 343 (Paul Finkelman ed., 2006).

<sup>26</sup> See JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES* 2 (2001) (analyzing the various movements taking place during the American Revolution, and how they influenced politics in the post-revolutionary era).

<sup>27</sup> Alexander Hamilton was certainly one of the most vigorous advocates for a more expansive view of the potential future of the United States. See RON CHERNOW, *ALEXANDER HAMILTON* 3, 6, 254–56, 351–54, 377–79 (2004) (explaining how much of the American capitalist system can be accredited to Hamilton’s foresight in his expansive commercial vision and democratic design).

<sup>28</sup> David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 666–68 (2018) (reviewing RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016)). This is a subject that will be discussed at some length in Part V, *infra*.

<sup>29</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864–65 (1989) (discussing how originalism works to eliminate judicial preference).

is to prohibit them—no matter how divided the judges—as in the French judicial system, the European Court of Justice, and many other civil law jurisdictions modeled on the French system.<sup>30</sup> If a jurisdiction permits dissenting opinions, it can accommodate them in at least two ways. If there is a large majority in favor of the decision, such as the occasional fifteen-to-two<sup>31</sup> and sixteen-to-one<sup>32</sup> decisions in the European Court of Human Rights, one can say that the dissenters are just plain wrong. That is a harder perspective to take if the division is five-to-four as is often the case in the Supreme Court of the United States. But if one accepts that the body of the law is always adapting to accommodate the evolution of society, as has traditionally been the case in common-law countries, it is not too unsettling since judges in these legal systems are expected, when necessary, to engage in judicial legislation as long as the changes are not too frequent or too broad.<sup>33</sup> But if one is looking for a truth that trumps legal traditions and government practice, and also accepts that there is a fixed meaning to a constitution that must be followed regardless of how much sense it makes in contemporary society, one would find the recent history of five-to-four decisions in the Supreme Court of the United States very troubling.

In the five terms from 2010 through 2014, the Supreme Court of the United States decided 383 argued cases, not all with written opinions.<sup>34</sup> Of these 383 cases, eighty-three (over 22%) involved at least one issue on which the Court divided five-to-four.<sup>35</sup> More germane and noteworthy is that of these eighty-three five-to-four decisions, in fifty-nine of them, Justices Ginsburg, Breyer, Sotomayor, and Kagan were together either as dissenters or as part of the majority.<sup>36</sup> Chief Justice Roberts and Justices Scalia, Thomas, and Alito were likewise together as part of the majority or as the

<sup>30</sup> Michael Kirby, *Judicial Dissent—Common Law and Civil Law Traditions*, 123 L. Q. REV. 379, 382–83, 395 (2007).

<sup>31</sup> See, e.g., *S.A.S. v. France*, 60 Eur. Ct. H.R. at 59 (2014) (holding by fifteen votes to two that there was not a violation of the convention, annexing the dissenting opinions from the judgment).

<sup>32</sup> See, e.g., *Leyla Sahin v. Turkey*, 44 Eur. Ct. H.R. at 39 (2005) (holding by sixteen votes to one that there was not a violation of the convention, annexing the dissenting opinion from the judgment).

<sup>33</sup> See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 220 (1960) (discussing the use of leeway in regards to the power of the judicial appellate office).

<sup>34</sup> These are the cumulative numbers taken from the Supreme Court section of the Chief Justice's Year-End Reports on the Federal Judiciary for the calendar years 2011 to 2015. *Chief Justice's Year-End Reports on the Federal Judiciary*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (last visited Nov. 6, 2018).

<sup>35</sup> These numbers are taken from the tabulations for the five terms from October Term 2010 (OT10) to October Term 2014 (OT14). Kedar S. Bhatia, *Final October Term 2017 Stat Pack*, SCOTUSBLOG 18 (June 29, 2018), [http://www.scotusblog.com/wp-content/uploads/2018/06/SB\\_Stat\\_Pack\\_2018.06.29.pdf](http://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf). A similar pattern has continued in October Term 2017 (OT17), the first full term in which Justice Gorsuch was a member of the Court. Roberts, Thomas, Alito, and Gorsuch were members of the majority in thirteen cases in which Ginsburg, Breyer, Sotomayor, and Kagan were the dissenters. *Id.* at 18–19.

<sup>36</sup> *Id.*

dissenters.<sup>37</sup> As will be shown as this discussion proceeds, these cases often reflect the debate on whether precedents should continue to be followed or whether the alleged “original understanding” of the founding generation should prevail over the traditional legal practice of stare decisis.<sup>38</sup> Surely a judicial process that regularly produces these sorts of outcomes needs greater justification than that five is more than four. Particularly if it is to escape the charge that controversial decisions are often driven as much by political or ideological considerations, and even by the results of presidential elections, as by the “law.”

## II. EPISTEMOLOGICAL PROBLEMS

One of the universally accepted purposes of a written constitution is to provide a body of law that is insulated from direct political interference and, hopefully, even pressure. In the United States, this endeavor to maintain the continuity and integrity of constitutional adjudication has typically been played out through a process of constitutional adjudication that tries to merge textual meaning and historical practice in a way that produces a coherent whole.<sup>39</sup> The present time is perceived as a period of great social and economic change. Many people, including members of the public at large, as well as some judges and academics argue that, in constitutional interpretation, the continued reliance by the Court on allegedly wrongly decided judicial precedents and long-standing governmental practice has given the judiciary a role in government that is inappropriate for judges.<sup>40</sup> This is because it ignores the whole purpose of a fixed written constitution designed to insulate its interpretation from extra-textual ideological and political considerations. To fulfill this purpose, it is argued that because the Constitution provides a method for its amendment, if change is needed, it should be made through that process, even if it is difficult, cumbersome, time-consuming, and often impossible as a practical matter.<sup>41</sup>

As already noted, this emphasis on text treats the Constitution as

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<sup>37</sup> *Id.*

<sup>38</sup> See *infra* text accompanying notes 115–23.

<sup>39</sup> See Grewal & Purdy, *supra* note 28, at 692–93 (discussing how judges may seek to synchronize constitutional approaches).

<sup>40</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 2 (2012) (describing the increasingly troublesome legislative role of the judicial branch).

<sup>41</sup> *Id.* at 2–7; BORK, *supra* note 6, at 143–49. See also Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL. 817, 818–21 (2015) (describing how originalism seeks legal change through avenues that have been defined by the law and are interpreted in the context during which they were instituted); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1–2 (2015) (noting the controversy surrounding constitutional interpretation and the tensions between originalist and living constitutionalist approaches); Scalia, *supra* note 29, at 852–56 (discussing the textual interpretation of the judiciary and the importance of adhering to the original language of legislation); *supra* text accompanying notes 8–14 (discussing how judges cannot always write their opinions in the most morally acceptable ways).

something of a secular scripture. The question is whether this view of the text of the Constitution is like that of St. Augustine,<sup>42</sup> who in the early fifth century cautioned against always taking the factual statements in the Bible literally rather than figuratively, or something more like the approach of modern-day believers in scriptural inerrancy.<sup>43</sup> The position of those who insist on the absolute supremacy of the original understanding of the Constitution, when it is ascertainable, is more like that taken by the latter. As many have pointed out, even the clearest instructions must allow for exceptions.<sup>44</sup> Kent Greenawalt gives an example of an instruction given to an intelligent child “not [to] leave [his] room in the next half hour for any reason whatsoever,” for disciplinary purposes.<sup>45</sup> One would expect, and surely hope, that the child would leave the room should a fire break out.<sup>46</sup> One might also hope that, even if the original understanding of the Founders’ generation is easily discoverable, the same resort to common sense might sometimes be accepted as appropriate in constitutional adjudication.

Nevertheless, relying on the obligation to respect the original understanding of the Founders’ generation when that understanding can be clearly ascertained, the Court, in a five-to-four decision, recently overturned precedents that it claimed extended the capacious reach of the Commerce Clause beyond what the Founders’ generation intended.<sup>47</sup> Additionally, with the same division among the Justices, the Court overruled a precedent allowing greater regulation of firearms than they asserted the Second Amendment allowed.<sup>48</sup> By respecting the wishes of the Founders, this

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<sup>42</sup> ST. AUGUSTINE, 1 LITERAL MEANING OF GENESIS 19, at 415 (John H. Taylor trans. 1982). This is Volume 41 in a series denominated ANCIENT CHRISTIAN WRITERS: THE WORKS OF THE FATHERS IN TRANSLATION (Johannes Quasten et al. eds., 1982). St. Ambrose is also among the early church fathers who took the same position. See R. H. Malden, *St. Ambrose as an Interpreter of Holy Scripture*, 16 J. THEOLOGICAL STUD. 509, 510–16 (1915) (discussing the moral and allegorical interpretations of biblical stories in the Old Testament).

<sup>43</sup> *Id.*

<sup>44</sup> See Kent Greenawalt, *Philosophy of Language, Linguistics, and Possible Lessons about Originalism*, in THE NATURE OF LEGAL INTERPRETATION 46, 51–53 (Brian G. Slocum ed., 2017) (arguing that linguistically, there are exceptions to a rule even if not stated, and citing numerous additional scholars to support that claim).

<sup>45</sup> *Id.* at 57.

<sup>46</sup> *Id.* This book also contains a sharp exchange between Lawrence B. Solum, *Originalism, Hermeneutics and the Fixation Thesis*, in THE NATURE OF LEGAL INTERPRETATION 130 (Brian G. Slocum ed., 2017), and Francis J. Mootz, III, *Getting Over the Originalism Fixation*, in THE NATURE OF LEGAL INTERPRETATION 156 (Brian G. Slocum ed., 2017).

<sup>47</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 547–63 (2012). The Chief Justice, however, joined the four dissenters on the Commerce Clause issue to uphold the act as an exercise of Congress’ power to impose taxes. *Id.* at 646.

<sup>48</sup> *Heller v. District of Columbia (Heller)*, 554 U.S. 570, 636 (2008). This decision overrode the unanimous decision of the Court in *United States v. Miller*, 307 U.S. 174, 179 (1939), that the Second Amendment’s principal purpose was to provide for a trained militia. In *McDonald v. Chicago*, 561 U.S. 742 (2010), also a five-to-four decision, the Court held that the Second Amendment is one of the provisions of the Bill of Rights that is fully applicable to the states through the Fourteenth Amendment.

approach to constitutional adjudication claims to base judicial decisions on historical fact.<sup>49</sup> As such, it is a subset of the many attempts to make judicial decision making a largely fact-based process, a subject that will be discussed more broadly as the discussion proceeds. It is argued that anchoring difficult constitutional decisions to the historical facts surrounding the adoption of the Constitution can give certainty to the law, and it also insulates the Court from the suggestion that it is assuming an inappropriate constitutional role and circumventing the amendment process.<sup>50</sup> Whether this "true" meaning or understanding of the Constitution will stand forever once it has been established is another question.

The many problems raised by this approach to constitutional adjudication have led to the present explosion of academic discourse on what is exactly meant by originalism, its merits, and the validity of the epistemology upon which it is based.<sup>51</sup> The core of the debate revolves around the attempt to answer the difficult questions noted in the introduction. These include determining what exactly was the original public understanding of the meaning of the text of the Constitution, and what was expected at the time of the Constitution's adoption to be the judiciary's role in interpreting that text over time. These are questions that are not easily answered, as the plethora of five-to-four decisions clearly illustrates. First of all, it is difficult to determine the actual meaning of constitutional provisions when their meaning is seriously contested in particular cases. In *Heller v. District of Columbia*, the first of the recent Second Amendment cases, the Court was confronted with a precedent<sup>52</sup> holding that, because the right to bear arms was, as the text itself suggested, premised on the need for a "well-regulated Militia,"<sup>53</sup> the federal and state governments had considerable

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*Id.* at 778. Although some of the substance of the Bill of Rights was applied to the states under the Due Process Clause of the Fourteenth Amendment, it was not until the 1960s that the verbatim application of some of the Bill of Rights began to be extended to the states under that clause. *See, e.g.,* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (applying freedom of speech under the First Amendment to the states via the Due Process Clause of the Fourteenth Amendment); *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (applying the right to a jury trial in criminal cases under the Sixth Amendment via the Due Process Clause of the Fourteenth Amendment).

<sup>49</sup> *See* Solum, *supra* note 41, at 46 ("From the perspective of originalism, the question is which of these two competing interpretations provides the actual communicative content of the Fourteenth Amendment. What kind of evidence bears on this question? One . . . kind of evidence is based on linguistic facts (patterns of usage during the Reconstruction Era) and context (the circumstances in which the Fourteenth Amendment was drafted and ratified): call this kind of evidence 'historical facts.'").

<sup>50</sup> *See* BORK, *supra* note 6, at 43; Sachs, *supra* note 41, at 839-46.

<sup>51</sup> *See supra* notes 20-22, 24 (naming academic sources discussing the merits and theoretical framework of originalism); *infra* text accompanying notes 108-16 (differentiating between redistricting done by the legislature and by ballot initiative using originalism).

<sup>52</sup> *See Heller*, 554 U.S. at 623 (discussing *Miller*'s "proposition that the Second Amendment right . . . extends to only certain types of weapons").

<sup>53</sup> *See id.* at 637 (Stevens, J., dissenting) ("Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to

latitude in regulating the possession and use of firearms by individuals. Against the contention of the four dissenting justices, the *Heller* majority, in an opinion written by Justice Scalia, held that the Amendment was also, if not even primarily, aimed at guaranteeing a pre-existing individual right to carry arms to defend one's self, family, and home.<sup>54</sup> While some regulation of the possession of firearms was permissible, and actually practiced both before and after the adoption of the Constitution, the majority ruled that the admittedly *very* severe restrictions on the carrying and possession of hand guns in the District of Columbia were unconstitutional.<sup>55</sup> The correctness of the Court's ruling about the actual original understanding of the Second Amendment is by no means accepted by many scholars<sup>56</sup> who agreed with Justice Stevens, the author of one of the two dissents joined by all the dissenters in *Heller*.<sup>57</sup> More recent and more extensive historical scholarship provides considerable support for the position of Justice Stevens and those who, in the aftermath of the *Heller* decision, supported his position.<sup>58</sup> Nevertheless, the question for the moment is what sort of regulation is permitted regarding either the individuals who may carry firearms or the type of firearms they may carry. Recently, in *Friedman v. City of Highland*, the Court refused to decide whether it is permissible to regulate the possession of automatic weapons.<sup>59</sup> In dissent, Justice Thomas, joined by

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regulate private civilian uses of firearms.”); *id.* at 681 (Breyer, J., dissenting) (“[T]he Second Amendment protects militia-related, not self-defense-related, interests.”); *McDonald v. Chicago*, 561 U.S. 742, 890 n.33 (2010) (Stevens, J., dissenting) (“[T]he court badly misconstrued the Second Amendment in linking it to the value of personal self-defense above and beyond the functioning of state militias . . . .”); *id.* at 917 (Breyer, J., dissenting) (“In my view, . . . the Fourteenth Amendment does not incorporate the Second Amendment right to keep and bear arms for purposes of private self-defense.”).

<sup>54</sup> See *Heller*, 554 U.S. at 628 (“The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”); *id.* at 592 (“We look to [the historical background] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”).

<sup>55</sup> See *id.* at 636 (“The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.” (citations omitted)).

<sup>56</sup> See, e.g., Paul Finkelman, *The Living Constitution and Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623, 624 (2015) (criticizing the Supreme Court's historical analysis of the Second Amendment); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 740–47 (2013) (summarizing the criticism of originalist historical analysis in *Heller*). See generally MICHAEL WALDMAN, *THE SECOND AMENDMENT* (2014) (discussing the history of the Second Amendment and criticizing the originalist historical analysis in *Heller*).

<sup>57</sup> *Heller*, 554 U.S. at 636 (Stevens, J. dissenting). Justice Breyer wrote the other unanimous dissenting opinion. *Id.* at 681 (Breyer, J. dissenting).

<sup>58</sup> PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* 41–121 (2018) (arguing that the main thrust of the Second Amendment was indeed concerned with the militia and that much of the scholarship and treatment of historical evidence relied on by Justice Scalia was both biased and poorly researched).

<sup>59</sup> See 136 S. Ct. 447, 447 (2015) (mem.) (denying certiorari).

Justice Scalia, declared that the Court should have decided whether semi-automatic rifles with magazines holding ten bullets were covered by the guarantee of the Second Amendment.<sup>60</sup> They noted that the Seventh Circuit's decision "flouts two of our Second Amendment precedents."<sup>61</sup> Subsequently, the Court vacated and remanded for further consideration a Massachusetts decision that had upheld a prohibition on the use of stun guns on the ground that they were not in common use at the time of the Second Amendment's adoption.<sup>62</sup> The Court relied on the statement in *Heller* that the "Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."<sup>63</sup>

Obviously, at the time of the Second Amendment's adoption in 1791, automatic rifles were unknown. That, of course, leads us to the next question. Assuming the original understanding of a particular term can be said to be ascertainable, what happens when over time the meaning of that term expands well beyond the expectation of the Founders' generation? If automatic rifles can be considered a natural evolution of a term with a historically more limited reach, how about a laser gun or any other weapon that, while not considered a "firearm," is as lethal as a weapon that fires bullets? The problem of whether the meaning of the text of the Constitution should reflect the evolution of the scope of the crucial words in question is a difficult one.

In contrast to the willingness in *Heller* to expand the meaning of "arms,"<sup>64</sup> Chief Justice Roberts, writing for four other Justices, held that the federal government could not use the Commerce Clause to support the requirement that individuals purchase health insurance for themselves because the Founders could not have conceived that lacking health insurance would be within the meaning of "commerce" at the time the Constitution was adopted.<sup>65</sup> Something like that argument was rejected in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*<sup>66</sup> in 1877, in which it was argued that the commerce power did not authorize Congress to grant telegraph companies the right to construct telegraph lines "over any portion of the public domain of the United States, . . . and . . . the military or post roads of the United States."<sup>67</sup> In rejecting that argument, and the contention

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<sup>60</sup> *Id.* at 450 (Thomas, J., dissenting); Lawrence Hurley, *Supreme Court Rejects Challenge to Assault Weapon Ban*, REUTERS (Dec. 7, 2015), <https://www.reuters.com/article/us-usa-court-guns/supreme-court-rejects-challenge-to-assault-weapon-ban-idUSKBN0TQ1SU20151207>.

<sup>61</sup> *Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting).

<sup>62</sup> *Cactano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016) (per curiam).

<sup>63</sup> *Id.* at 1027 (quoting *Heller*, 554 U.S. 570, 582 (2008)). One might ask, "How about particularly lethal explosive ammunition?"

<sup>64</sup> *Heller*, 554 U.S. at 576–77.

<sup>65</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 554–55 (2012).

<sup>66</sup> 96 U.S. 1 (1877).

<sup>67</sup> *Id.* at 3.

of two of the three dissenters that Congress only had the power to authorize construction on land actually belonging to the United States,<sup>68</sup> the Court declared that, “within the scope of its powers,” the government of the United States “operates upon every foot of its territory.”<sup>69</sup> It also declared that, although the electric telegraph was unknown, “[t]he powers thus granted [to Congress] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.”<sup>70</sup> In recent times, the Court has accepted that the local growing of marijuana is within the commerce power of the federal government in order to support its criminalization of the use and possession of marijuana.<sup>71</sup> Although not joining the other five Justices in the majority opinion, Justice Scalia concurred in the judgment.<sup>72</sup>

In the light of these decisions, one would think that, in an age when almost any person who seeks medical help will use facilities and products that are dependent on interstate commerce and also in many ways supported by federal resources, requiring individuals to buy health insurance should be within the federal government’s power to support the economic structure of the United States. The fact that people have health insurance also facilitates the mobility of the labor force, and certainly has a greater impact on the economy than the local growing of marijuana.<sup>73</sup> Given this history, a cynic might say what the adopters of the Constitution understood to be the ambit of the meaning of its general terms is all in the eyes of the observer.<sup>74</sup>

The same subjective perspective might be attributed to the present Court in the reliance of some Justices on judicial notice of supposedly empirically discoverable social facts in their search for objective criteria to support their positions. The most famous recent instance in the United States is the finding made by a five-to-four majority of the Court in *Shelby County v. Holder*.<sup>75</sup>

<sup>68</sup> *Id.* at 17 (Field, J., dissenting).

<sup>69</sup> *Id.* at 10.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> *Gonzales v. Raich*, 545 U.S. 1, 19–22 (2005).

<sup>72</sup> *Id.* at 33 (Scalia, J., concurring).

<sup>73</sup> *Compare Effects of Health Care Spending on the U.S. Economy*, U.S. DEP’T HEALTH & HUM. SERVS., (Feb. 22, 2005) (reporting \$1.67 trillion spent on health care in 2003), with Eli McVey, *US Marijuana Industry’s Economic Impact Could Hit \$80 Billion by 2022*, MARIJUANA BUS. DAILY (May 29, 2018), <https://mjbizdaily.com/chart-us-marijuana-industrys-economic-impact-could-reach-80-billion-by-2022> (reporting \$20–23 billion in total economic impact for marijuana in 2017).

<sup>74</sup> While Chief Justice Roberts relied on what the Founders might have understood to be commerce in ruling that Congress’s commerce power does not cover imposing an obligation to buy health insurance, he had no trouble in agreeing that forcing someone to pay a tax for not buying health insurance was within the taxing power. It is hard to believe that the Founders would have thought that to be a legitimate use of congressional power. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555, 558–61, 571–74 (2012) (holding constitutional protection from federal regulations governing inactivity does not apply to taxing power).

<sup>75</sup> 133 S. Ct. 2612 (2013). Chief Justice Roberts delivered the opinion of the Court. *Id.* at 2617.



The Court held that Section 4 of the Voting Rights Act of 1965, as reauthorized in 2006, was unconstitutional because current social conditions in the United States did not justify imposing on the states and other public bodies the burdens of seeking pre-clearance of changes affecting voting procedures in previously segregated areas of the country.<sup>76</sup> That social conditions in the United States had changed for the better since 1965 is indisputable—but how great that change had been is another matter. The question is, how did the Court know that the extent of this change was so self-evident that it made pre-clearance unnecessary in 2013 when the Court decided the case? It is obvious that what is the true state of current society is often not completely clear. Much of what we believe to be true is merely the opinion of experts who have studied the subject and have a much deeper knowledge of the concrete facts underlying their opinions. There was no such unanimity of opinion among academic experts at the time *Shelby* was decided, and certainly no sufficient agreement as to the present social conditions in the country to support a judicial conclusion that Congress' contrary assumption was no longer supported by the facts.<sup>77</sup>

More common are judicial declarations about what will or will not happen if a case is or is not decided in a particular way. For example, in *Boumediene v. Bush*,<sup>78</sup> Justice Scalia argued, in his dissent from the Court's holding, that its recognition of the constitutional right to habeas corpus of detainees in Guantanamo "will almost certainly cause more Americans to be killed."<sup>79</sup> To the extent that this can be said to be a matter of certainty, it is no more of a certainty than the claim that the release of convicted felons—including those found guilty of homicide—will lead to more crimes. Scalia's statement is possibly even less certain because released felons have in fact been found guilty of crimes, whereas the detainees in question have not yet been convicted of any crimes.<sup>80</sup> In speculating as to what might happen, Justice Scalia did not consider the serious possibility that denying detainees the right to question the legality of their detention might increase the hostility of jihadists and actually increase the risk of Americans being killed.

Similarly, in *Gonzales v. Carhart*,<sup>81</sup> another five-to-four decision, the Court upheld the constitutionality of the Partial-Birth Abortion Act on the ground that, although it found "no reliable data to measure the phenomenon,

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<sup>76</sup> *Id.* at 2625–32.

<sup>77</sup> In retrospect, if anything, the Chief Justice was woefully wrong in assuming his assertion was self-evident. See Editorial, *The Voters Abandoned by the Court*, N.Y. TIMES, Nov. 9, 2016, at A26 (detailing "anti-voter" laws enacted after *Shelby County*).

<sup>78</sup> 553 U.S. 723 (2008).

<sup>79</sup> *Id.* at 828 (Scalia, J., dissenting). He finished his dissent with the words: "The Nation will live to regret what the Court has done today." *Id.* at 850.

<sup>80</sup> See *id.* at 766–67 (noting detainees have been afforded some process, but "there has been no trial by military commission for violations of the laws of war").

<sup>81</sup> 550 U.S. 124 (2007).

it seems unexceptionable to conclude [that] some women come to regret their choice to abort the infant life they once created . . . [and] [s]evere depression and loss of esteem can follow.”<sup>82</sup> Considering the extreme conditions that might prompt a woman to seek a partial-birth abortion,<sup>83</sup> a woman who decided not to undergo this procedure might even be more likely to regret that choice. Giving birth to a hydrocephalic baby would surely be a cause of emotional distress. More importantly, reliance on that type of psychological speculation without any serious empirical support is a questionable judicial practice when delimiting the scope of constitutional rights.

Finally, one might note that, in his dissent in *National Federation of Independent Businesses v. Sebelius*,<sup>84</sup> Justice Scalia went out of his way to declare why the Affordable Care Act would not be effective in practice—an assertion that many people would not accept has come to pass and definitely not a result that most people at the time of that decision would have considered a certainty.<sup>85</sup> He also asserted that not striking down the whole statute would prevent Congress from starting “afresh”<sup>86</sup> which, given the congressional climate at the time the Court rendered its decision, was highly unlikely. Giving objectivity to judicial resolution of controversial issues by reference to supposedly universally accepted facts—by either the founding generation or contemporary society—is often a fraught exercise.

### III. PRESERVING ORIGINALISM BY LINGUISTIC STRATAGEMS

One of the ways to preserve superficial faithfulness to the language used by the Founders in the Constitution is to exploit specific language in the Constitution that raises what might be called an “affirmative that is pregnant with a negative.” A prominent example is the provision in Article I, Section 8, Clause 5 granting Congress the power “[t]o coin [m]oney”<sup>87</sup> and make it legal tender, which, for a brief time, was construed by the Court to prohibit Congress from authorizing the printing of paper money to fund the Civil War.<sup>88</sup> That decision was overturned sixteen months later.<sup>89</sup> Given the antipathy of the founding generation to paper money in light of its use to fund the American Revolution and their assumption that the federal government really was one of enumerated powers, it is more likely than not

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<sup>82</sup> *Id.* at 159 (citations omitted).

<sup>83</sup> *Id.*

<sup>84</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 646 (2012) (Scalia, J., dissenting).

<sup>85</sup> *Id.* at 651.

<sup>86</sup> *Id.* at 706. For an examination of the frequency of the Court’s reliance on facts not included in the record, see Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1264–1277 (2012).

<sup>87</sup> U.S. CONST. art. I, § 8, cl. 5.

<sup>88</sup> *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1869).

<sup>89</sup> *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 457 (1871).

that they would have agreed that the federal government could not issue paper money and make it legal tender. Oliver Wendell Holmes, Jr., certainly thought that was the original understanding of the clause.<sup>90</sup> Nevertheless, it is not surprising that Congress would take advantage of the failure to prohibit the issuance of paper money as allowing it to do so. There are, however, still recent situations in which it has been argued that a constitutional grant of power could contain an implied negative.<sup>91</sup>

Similarly, it has been held that a provision of the Constitution which prohibits a specific action does not prohibit other actions that accomplish the same goal. That might be said to be an example of a negative that is pregnant with an affirmative. For example, Article 1, Section 10, Clause 1 prohibits states from emitting bills of credit.<sup>92</sup> Nevertheless, regardless of this provision, state-licensed banks—including banks owned by the states and whose officers were appointed by public officials—issued bank notes that functioned as currency throughout the nineteenth century.<sup>93</sup> The issuing of bills of credit by state-owned banks, which functioned as currency, was, not surprisingly, challenged as being unconstitutional.<sup>94</sup> In 1837, the Court rejected this argument and rendered the provision meaningless.<sup>95</sup> This avoidance of what seemed to be the clear intention of what the Founders wanted to accomplish by resort to an alternative terminology was not an unexpected result. With the failure to renew the charter of the Second Bank of the United States, the United States had nothing that could be considered a national currency other than the coins minted by federal mints.<sup>96</sup> The United States Treasury issued paper money for the first time during the Civil War, and Congress passed the National Bank Act in 1863, allowing national banks to issue paper money.<sup>97</sup> Before that, with gold both scarce and cumbersome to carry, people had no other option but to use bank notes issued by state-

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<sup>90</sup> See Letter from Oliver Wendell Holmes, Jr. to the editors of the *American Law Review*, in 4 AM. L. REV. 766, 768 (1869) (“I cannot . . . see how the right to make paper legal tender can be claimed for Congress when the Constitution virtually contains the words, ‘Congress shall have the power to make metals legal tender.’”). The matter is further discussed in CHARLES FAIRMAN, VI HISTORY OF THE SUPREME COURT, RECONSTRUCTION AND REUNION 1864–88, PART ONE 715, 763 n.221 (1971). Justice Field made the same point at greater length, using similar language to that of Holmes, in his dissent in *Knox*, 79 U.S. (12 Wall.) at 634.

<sup>91</sup> In *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034–36 (2016) (Thomas, J., dissenting), Justice Thomas, together with Justice Alito, argued that the grant of original jurisdiction to the Supreme Court to hear cases between states did not permit the Court to exercise its discretion not to consider such a case.

<sup>92</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>93</sup> See JAMES WILLARD HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970 63 (1973) (discussing the rise of bank notes being used as currency).

<sup>94</sup> *Briscoe v. President of the Bank of Ky.*, 36 U.S. (11 Pet.) 257, 260, 286–87 (1837).

<sup>95</sup> *Id.* at 257.

<sup>96</sup> See HURST, *supra* note 93, at 62–63 (discussing the restriction on state-chartered banks to create currency such as notes—a power which had been given to them by Congress).

<sup>97</sup> *Id.* at 278.

chartered and state-owned banks.<sup>98</sup> With the passage of the National Bank Act, many people also thought that most state-chartered banks would seek national charters to take advantage of that opportunity.<sup>99</sup> But that proved not to be the case. More erroneous was the widely held belief that a congressional act putting a ten percent tax on the issuance of bank notes by state-chartered banks would end the issuance of “money” by state banks.<sup>100</sup> Since most transfers of money came to be in the form of checks written on banks, currency became a minor portion of the money supply, regardless of what the founding generation may have thought they had accomplished in preventing states from issuing “bills of credit.”<sup>101</sup> We now have a financial system consisting largely of electronic transfers based on a cache of digitalized figures stored in a “Cloud,” something no Founding Father could have remotely conceived acceptable, let alone possible.

#### IV. OTHER INSTANCES IN WHICH LITERALISM HAS NOT TRIUMPHED

There are many other ways in which the Court has departed from what the drafters of the Constitution thought they were doing. For instance, it is clear that at the time of the adoption of the Sixth Amendment, the right to assistance of counsel was not understood as requiring the government to provide counsel to indigents accused of crimes.<sup>102</sup> Additionally, even very specific terms that were clearly understood at the time of their adoption to have a specific narrow meaning have been greatly expanded.<sup>103</sup> The Court has also departed from the Drafters’ determination of what an acceptable punishment is—for example, flogging was acceptable when the Eighth Amendment was adopted.<sup>104</sup> By the time of his death, Justice Scalia came to believe that the Court was wrong to have declared that practice unconstitutional.<sup>105</sup> He was also one of the four dissenters from the Court’s

<sup>98</sup> HURST, *supra* note 93, at 178.

<sup>99</sup> *Id.* at 180.

<sup>100</sup> See *id.* (explaining that while proponents of the 1865 tax “thought they were removing the state banks from influence on the money supply . . . deposit check money rather than bank notes was becoming the principal instrument of bank lending”).

<sup>101</sup> *Id.*

<sup>102</sup> See Judy Norris, *History of Indigent Defense in the United States*, 18 UPDATE ON L.-RELATED EDUC. 16, 16–17 (1994) (explaining the development of the requirement that the government provide counsel to indigents accused of crimes, which took place long after the adoption of the Sixth Amendment).

<sup>103</sup> See, e.g., Bryan A. Garner, *A Tribute to Nino*, 102 A.B.A.J. 24, 24 (2016) (explaining the evolution of the word “nimrod”).

<sup>104</sup> David E. Weisberg, *Justice Scalia’s Originalism: A Flawed Theory that Obscures an Important Truth* 16–17 (Jan. 24, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2746859](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746859).

<sup>105</sup> See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. 3 (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> (interviewing Justice Scalia about his reformed belief that flogging is “immensely stupid, but . . . not unconstitutional”). In his article, *Originalism: The Lesser Evil*, Justice Scalia seemed to suggest that all originalists would strike down any attempt by the states to re-introduce flogging. Scalia, *supra* note 29, at 861.

decision that juveniles sentenced to life imprisonment without parole must eventually be given an opportunity to show that their sentences should be commuted.<sup>106</sup>

The attempt to make legal decision-making a quasi-deductive process—with discoverable basic premises which remove from courts the power and the need to engage in an exercise of practical wisdom—is a practical impossibility. It assumes not only that these basic premises are discoverable but also that, once discovered, their meaning will stay rigidly fixed forever—regardless of the political, social, and economic evolution of the nation—because this is what the founding generation actually wanted and expected. Nor does that approach give sufficient attention to the possibility that future research will reveal that current understandings of original meanings are, in fact, erroneous. The attempt to impose a casuistic approach based on a word-by-word linguistic analysis misses the essence of what a constitution is all about, and, as we have seen in the legal tender and the bills of credit cases, can often be avoided by parsing the meaning of individual words and sentences.<sup>107</sup>

The problems created by an approach to constitutional adjudication that focuses so heavily on the meaning of individual words and ignores the basic purpose of a constitution is also illustrated by the five-to-four decision in *Arizona State Legislature v. Arizona Independent Re-districting Commission*.<sup>108</sup> The issue was the meaning of the word “legislature” in Article 1, Section 4, Clause 1 of the Constitution: Could a provision in the Arizona constitution, overwhelmingly adopted by referendum, which gave redistricting authority to an independent commission, be considered an act of the legislature?<sup>109</sup> Despite New England town-hall law making and the submission of early state constitutions directly to ratification by the voters,<sup>110</sup> Chief Justice Roberts, writing for the dissenters, maintained that the Arizona commission was not established by the legislature because, at the time of the adoption of the Constitution, the general understanding was that a legislature was the “representative body which makes the laws of the people.”<sup>111</sup> Justice Ginsberg, writing for the majority, argued that the meaning of the word “legislature” was not so narrowly confined.<sup>112</sup> She

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<sup>106</sup> *Miller v. Alabama*, 567 U.S. 460, 479, 493 (2012) (Roberts, C.J., dissenting).

<sup>107</sup> It is not unusual for people to believe that they have said what they meant to say even though a stickler on grammar could interpret what they have said to mean something different. Whether that phenomenon is to be welcomed or deplored depends on the circumstances.

<sup>108</sup> *Ariz. State Legislature v. Ariz. Indep. Re-Districting Comm’n*, 135 S. Ct. 2652, 2653 (2015).

<sup>109</sup> *Id.* at 2659.

<sup>110</sup> See Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 57 (1982) (discussing how ratification of state constitutions by popular referendum became the trend during the post-Civil War 1800s).

<sup>111</sup> *Ariz. State Legislature*, 135 S. Ct. at 2679 (Roberts, C.J., dissenting).

<sup>112</sup> *Id.* at 2666.

observed that the Court had held in *Ohio ex rel. Davis v. Hildebrand* that an amendment to the Ohio Constitution that gave the people of the state the right, exercisable by referendum, to approve or disapprove any law enacted by the state legislature was also applicable to an act redistricting the state's congressional districts.<sup>113</sup> She also noted that in *Smiley v. Holm*, the Court had held that redistricting legislation in Minnesota could be subject to the governor's veto power.<sup>114</sup> The Chief Justice rejoined that, in these cases, the Court recognized that a legislature was the "*representative body*" that makes "the laws of the people" and in the case at hand there was no participation at all by that body in the Arizona redistricting process.<sup>115</sup> There is no question that the founding generation wanted a process that responded to the people of the respective states.<sup>116</sup> They never envisaged, however, that with current technology, legislatures could be dispensed with and all laws would be made by referenda conducted on the internet in which citizens would vote on laws proposed by the executive or by petition. Whatever the "true interpretation" of the term "legislature" in Article 1, Section 4 of the Constitution, I am skeptical that the Founders, who accepted the importance of states' rights more than is now generally accepted, would have insisted that the states were prohibited from using technological advances to introduce a more democratic law-making process unless the Constitution was amended.

Thus far, we have noted that the original understanding of the Constitution is often a very contested issue. If one focuses on specific terms that had only one meaning in 1787–1789 and the same meaning today—such as that the Senate "shall be composed of two Senators from each State," or that, to be President, one must "have attained to the [a]ge of thirty-five [y]ears,"<sup>117</sup>—a literal meaning makes sense. Beyond that, this approach makes less sense. Regarding more general terms, such as "Commerce with foreign Nations, and among the several States" and the "necessary and proper" clause,<sup>118</sup> the evidence of the true meaning of those broad terms during the founding period is uncertain and often contradictory, since it requires an inquiry into the worldview and psychological perspective of people who are long dead. General terms can have more than one meaning and we can never be sure the drafters always chose the most common meaning. If the most common meaning does not make any sense at all under present conditions, it would not be irrational or unfaithful to choose an

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<sup>113</sup> *Id.* at 2666–67 (citing *Ohio ex rel. Davis v. Hildebrand*, 241 U.S. 565, 566 (1916)).

<sup>114</sup> *Id.* at 2667 (citing *Smiley v. Holm*, 285 U.S. 355, 355 (1932)).

<sup>115</sup> *Id.* at 2678 (Roberts, C.J., dissenting) (citing *Smiley*, 285 U.S. at 365).

<sup>116</sup> See THE FEDERALIST NO. 45, at 237 (James Madison) (Ian Shapiro ed., 2009) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the [s]tate.").

<sup>117</sup> U.S. CONST. art. I, § 3; *id.* art. II, § 1.

<sup>118</sup> *Id.* art. I, § 8.

alternative meaning that has some plausible support. When the text of the Constitution is relatively specific and detailed, but its meaning has been hotly contested, it is not surprising that the dominant practice in constitutional interpretation has heretofore been to rely on a process that puts great stress on *stare decisis* and sticking with the initial judicial understanding because it gives the text the consistent and predictable meaning required for social stability.<sup>119</sup> When the text is composed of more general language, the Court has likewise relied heavily on the historical practices of Congress and the Executive branch as well as its own precedents and social morality—an approach resembling something like that taken in the judicial development of the ever-evolving common law.<sup>120</sup>

Much of the current controversy arises when a new set of justices insists that there is a clear original understanding of the meaning of some constitutional text that overrides *stare decisis*.<sup>121</sup> It is not at all clear that the Founding Fathers would have taken such a rigid position. James Madison, perhaps reluctantly but nevertheless believing it to be inevitable, accepted that the meaning of the Constitution would probably be determined by evolving governmental practice and by judicial construction in a manner that would not always be strictly in accord with the text as it was understood by the Founders. Writing some years after he had withdrawn from active participation in public affairs, he believed that Congress breached the First Amendment's strictures against the establishment of religion when it provided funds to pay the salary of military chaplains.<sup>122</sup> It is hard to believe that he would not have agreed with the dissenters in the government-funded school bus and textbook cases.<sup>123</sup> As has been pointed out many times, if one

<sup>119</sup> See Michael Gentithes, *In Defense of Stare Decisis*, 45 WILLAMETTE L. REV. 799, 799 (2009) (explaining that *stare decisis* assures citizens that Supreme Court decisions remain consistent over time, no matter who is on the Court, and keeps the Court sturdy when making final decisions on controversial issues).

<sup>120</sup> See Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1215, 1236 (2015) (discussing how historical events and precedent can affect interpretation of the Constitution); David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 937–39 (2016) (highlighting the reliance of Justices Brennan and Stevens on principle and precedent, as well as the necessity of accounting for broad historical and social happenings when examining cases); David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 6–7, 49 (2015) (discussing *Obergefell v. Hodges* as an example of the Supreme Court using “principles and precedents” rather than the text of the Constitution when forming the majority opinion).

<sup>121</sup> See, e.g., Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1194 (2008) (stating that *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), implies that “the meaning of the Constitution properly depends on how society views social facts at different times”).

<sup>122</sup> James Madison, *Madison's “Detached Memoranda”*, 3 WM. & MARY Q. 534, 558–59 (Elizabeth Fleet ed., 1946). This is believed to have been written before 1832. *Id.* at 534–35.

<sup>123</sup> *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting) (arguing that a law which allowed a local school board to reimburse parents of children attending Roman Catholic schools for school bus transportation costs created the “commingling” of Church and State in educational

looks at the text, the First Amendment only prohibited Congress from abridging freedom of speech and did not apply to the actions of other branches of the federal government, let alone state governments.<sup>124</sup> The fact that no one raised any First Amendment objections to the federal courts adjudicating common law defamation actions until 1964 certainly lends support to that conclusion.<sup>125</sup> As we all know, the prohibitions of the First Amendment have now been applied to all government actors, including the employees of states and municipalities and even entities receiving more than *de minimis* governmental assistance.

## V. THE HISTORICAL PURPOSE AND STRUCTURE OF WRITTEN CONSTITUTIONS

Despite an explosion of scholarship on the subject of “originalism,” a comprehensible and widely accepted understanding of what that term connotes and how it serves to direct over time the course of constitutional adjudication is not going to be achieved by sharpening the analytical and linguistic skills of scholars and judges. It might be useful, therefore, to step back and consider what historically was the structure and purpose of a written constitution. The so-called English Constitution, to which reference was often made well before the adoption of the American Constitution,

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matters); *id.* at 63 (Rutledge, J., dissenting) (arguing that the law “introduce[d] religious education and observances into the public schools” and “obtain[ed] public funds for the aid and support of various private religious schools”); *Bd. of Educ. of Cent. Sch. Dist. v. Allen*, 392 U.S. 236, 254 (1968) (Black, J., dissenting) (“The First Amendment’s prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people.”); *id.* at 266 (Douglas, J., dissenting) (“[T]he result of tying parochial school textbooks to public funds would be to put nonsectarian books into religious schools, which in the long view would tend towards state domination of the church.”); *id.* at 270–71 (Fortas, J., dissenting) (arguing that the books “are selected and their use is prescribed by the sectarian authorities” and therefore the “program [was] not one in which all children [were] treated alike . . .”).

<sup>124</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>125</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (holding that a state cannot, under the First and Fourteenth Amendments, award damages to a public official “for defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice . . .’”). Justice Stone declared in his famous footnote in *United States v. Carolene Products Co.* that “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth,” but made no mention of state common law. 304 U.S. 144, 152–53 n.4 (1938). *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), could be interpreted as presaging that result for civil litigation involving the First Amendment. But it was not until *Shelley v. Kramer*, 334 U.S. 1 (1948), that the Court ruled that enforcement of a state’s common law could be considered state action even in civil litigation between private parties. *Id.* at 23.



consisted of a *mélange* of unwritten conventions,<sup>126</sup> including: that revenue bills must originate in the House of Commons; that the House of Lords should never refuse assent to bills for “supply” (i.e. budget bills);<sup>127</sup> and written declarations such as the English Bill of Rights of 1689, all of whose provisions are stated either as statutory regulations governing governmental practices or hortatory declarations as to what “ought” or what “ought not” to be done.<sup>128</sup> In either case, regardless of the importance or moral force of these constitutional conventions, all their prohibitions or duties could be infringed or altered by future acts of Parliament, and on occasion have been.<sup>129</sup>

Written constitutions existed in Greece well before the time of Aristotle,<sup>130</sup> who died in 322 B.C.E., and quite possibly elsewhere as well. As described in the *Politics*, the purpose of a constitution was to describe who were the citizens of the body politic and to establish the structure of the state and the process for electing officials, as well as to allocate the responsibilities and duties of the individuals who filled the offices created by the constitution.<sup>131</sup> This almost exclusive focus on the structure of government was a feature of constitutions well into the eighteenth century. As such, they had no transcendent legal reach and could be altered by normal legislative action. This emphasis on the largely procedural aspect of constitutions and them being subject to normal legislative processes is reflected by the fact that, as stated by the historian Jack Rakove, “[a]ll but two of the [state] constitutions written in 1776 and 1777 were drafted by the provincial conventions that acted as surrogate legislatures during the Revolutionary interregnum . . . . None of these [state] constitutions were submitted to the people for approval; they were not *ratified* but simply promulgated by the bodies that drafted them.”<sup>132</sup>

<sup>126</sup> Robert Blackburn, *Britain's Unwritten Constitution*, BRITISH LIBRARY (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution#>.

<sup>127</sup> See T.F. Moran, *The Proposed Changes in the British House of Lords*, 7 PROC. AM. POL. SC. ASS'N 41, 45 (1910), which quotes the remarks of Prime Minister Asquith that “the action of the House of Lords in refusing to pass into law the financial provisions made by this House . . . is a breach of the Constitution and a usurpation of the rights of the Commons . . . and the most arrogant usurpation to which for more than two centuries the House of Commons has been asked to submit.” Moran’s article discusses the beginning of statutory limits to the power of the House of Lords arising out of the controversies surrounding the Irish Home Rule Bill.

<sup>128</sup> Bill of Rights 1 W. & M. 2 c.2 (1689).

<sup>129</sup> For example, the line of succession set forth in the English Bill of Rights was changed by Parliament in the Act of Settlement of 1701, 12 & 13 Will. 3 c.2 (1701).

<sup>130</sup> See X ATHENESIUM REPUBLICA (Constitution of the Athenians), THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH (Frederic G. Kenyon trans., Oxford 1921) (summarizing Athenian history and its ancient constitutions).

<sup>131</sup> X POLITICA, Bk. IV., THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH (Benjamin Jowett trans., Oxford 1921).

<sup>132</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 97 (1996).

These early constitutions were largely concerned with the structure of their post-colonial governments. It was common for many of the states to have a preamble to their constitutions containing a bill of rights, often using the language of the English Bill of Rights and framed using that document's wording of "ought" and "ought not," rather than as legally enforceable rights. The most famous of these was the Virginia Bill of Rights of June 12, 1776.<sup>133</sup> The legislature that adopted it then reconvened as a constitutional convention and adopted the Virginia Constitution of June 29, 1776, which contained no legally enforceable individual rights other than the retention of the existing rights of suffrage.<sup>134</sup> The few legally enforceable rights contained in these initial constitutions were largely confirmation of land titles granted by the Crown<sup>135</sup> and provisions granting the right to a jury trial and the right of counsel in criminal trials.<sup>136</sup> One of Jefferson's complaints about the Virginia Constitution was that, as an act of the legislature, it was amendable by legislative action.<sup>137</sup> In order to avoid this possible problem, the United States Constitution required an up-or-down ratification by state conventions rather than by acts of state legislatures.<sup>138</sup> Undoubtedly this feature contributed over time to the elevation of the Constitution to something more important, and eventually much more sacred, than ordinary legislation.

There is significant evidence, as pointed out by H. Jefferson Powell, that many people at the time of the Constitution's adoption anticipated that the Constitution, while not subject to legislative change, would be subject to the same methods of construction used by common law courts in construing statutory enactments, which are the nearest analogues to a written constitution.<sup>139</sup> That is not to deny the trend during the last decade of the eighteenth century to consider the Constitution as a document whose interpretation should be treated more seriously than would be a mere statute. This trend was encouraged by the increasingly popular notion proposed by Thomas Jefferson that the Constitution was a pact between the states whose

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<sup>133</sup> George Mason, *Transcription: The Virginia Declaration of Rights, June 12, 1776*, LIBR. VA., <http://edu.lva.virginia.gov/docs/VADeclaration.pdf> (last visited Nov. 23, 2018).

<sup>134</sup> *The Virginia Declaration of Rights, June 12, 1776*, LIBR. VA., [http://edu.lva.virginia.gov/online\\_classroom/shaping\\_the\\_constitution/doc/declaration\\_rights](http://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/declaration_rights) (last visited Nov. 23, 2018); VA. CONST. OF JUNE 29, 1776, available at [http://edu.lva.virginia.gov/docs/VAConstitution\\_trans.pdf](http://edu.lva.virginia.gov/docs/VAConstitution_trans.pdf) (last visited Nov. 23, 2018).

<sup>135</sup> See, e.g., N.Y. CONST. OF APRIL 20, 1777, art. XXXIV, available at [http://avalon.law.yale.edu/18th\\_century/ny01.asp](http://avalon.law.yale.edu/18th_century/ny01.asp) (last visited Nov. 23, 2018) (confirming land grants made by the King of Great Britain).

<sup>136</sup> See, e.g., *id.* (granting counsel in impeachment, criminal, and civil actions).

<sup>137</sup> See RAKOVE, *supra* note 132, at 99 (describing Jefferson's argument that the Virginia Constitution was not equipped to protect against legal challenges).

<sup>138</sup> *Id.* at 102.

<sup>139</sup> H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887 (1985).

provisions were more like contractual terms, rather than those of a document springing directly from the people.<sup>140</sup>

The novelty of the American Constitution was that it created a fundamental document that includes many judicially enforceable human rights and provides a significant role for the judiciary in construing that document. Focusing only on the literal contemporary meaning of the text of the Constitution ignores much of the historical hopes and fears of the founding generation. It is not merely that many of the Founders expected that the Constitution would evolve over time somewhat like the common law. Focusing on contemporary understanding of the text of the Constitution also ignores much of the mindset of the founding generation. The frequent reliance on the thought of John Locke is an indication of the contemporary view that all valid law was in some way underpinned, as was the Declaration of Independence, by the natural law. More specifically, one might ask what the Founders would have expected the courts to do if adherence to the original understanding, assuming it actually could be discovered, led to unjust or silly results. Would the Founders not also have views about the priority of conflicting constitutional provisions should an immediate decision need to be made? As the next section of this Essay maintains, would they not also have expectations, hopes, and fears about the future in which they and their descendants would live their lives? Surely all these aspects of their mindsets would be part of the original understanding.

#### VI. WHAT WERE THE HOPES AND EXPECTATIONS OF THE GENERATION THAT PRODUCED THE AMERICAN CONSTITUTION?

Probably the most important question is what were the long-run hopes and expectations of those who drafted and adopted the Constitution? Obviously, they wanted a stable institution and one whose basic structure did not change overnight. That is why they made it difficult to amend. At the same time, they also wanted an institution that could endure indefinitely over time. The language they used was a means to an end and not an end in itself. Would they have accepted that the clear meaning of two conflicting constitutional provisions must be honored even if it led to government paralysis? This would make the Constitution a set of discreet absolute individual provisions and ignore the Founders' purpose in drafting that document. If they had realized that the Earth was much older than the contemporary common assumption of roughly six-thousand years and likely to endure for billions more,<sup>141</sup> they would have had even more reason to

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<sup>140</sup> See H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 692 (1994) (discussing Thomas Jefferson's efforts to support his narrow interpretation).

<sup>141</sup> See MARIO LIVIO, *BRILLIANT BLUNDERS* 60–62, 73–75 (2013) (exemplifying that even among brilliant scientists, well into the middle of the twentieth century, it was widely thought that the earth was at most 500,000 years old).

place added weight on accommodating unforeseen future needs. They surely would have agreed with Justice Jackson that the Constitution should not be turned into a “suicide pact.”<sup>142</sup> The real question is whether they expected and indeed wanted an institution whose framework would evolve gradually over time as the social and economic environment of the nation evolved, or whether they were committed to the view that, unless the Constitution were amended, it should forever be fixed to support a late-eighteenth century society, even if it was clear beyond any doubt that rigidity would lead to disaster. Would they have preferred a gradual common-law-like evolution or would they have instead reconciled themselves to accepting abrupt changes brought about by civil war or by economic collapse?

To take the Second Amendment, even assuming that personal defense rather than the need for supporting a militia was the main purpose of the amendment, would the Founders want no accommodation in broadening the permissible regulation of firearms? What if their overwhelmingly rural society evolved into one that was largely urban with professional police forces? What if it also had a gun homicide rate more than five times higher than the country with the next highest rate among advanced societies and twelve times the rate in Germany?<sup>143</sup> Would they also have assumed that the concept of “commerce among the states” as well as with foreign countries would be forever fixed as it was understood in the late eighteenth century?

To say that the Founders were not following the tack of some interpreters of religious texts—who claim that the moral and social norms of a body politic were fixed forever in the second or third centuries or the seventh and eighth centuries of the common era—because the problem could be fixed by constitutional amendment is unrealistic. How would such an amendment be worded? Would it declare that “commerce” should be defined by current twenty-first century conditions or more generally by evolving contemporary economic conditions? As rapidly as the global, social, demographic, and economic conditions are changing, any relatively concrete provisions designed to deal with current issues would quickly become obsolete. The amendment process would not only always be behind in adjusting, but would also end up producing a lengthy document that could

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<sup>142</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Although his comment was hyperbolic in that case, the comment was apropos. Thomas Jefferson believed that the acquisition of the vast territory of the Louisiana Purchase required a constitutional amendment because the Constitution granted no such authority. JEREMY D. BAILEY, *THOMAS JEFFERSON AND EXECUTIVE POWER* 172 (2007). He nevertheless approved it on grounds of necessity and sent the treaty between France and the United States to the Senate, which handily ratified, and Congress provided the funding. *See id.* at 171–72 (describing the maneuvering around the constitutionality of the purchase).

<sup>143</sup> *See* Kevin Quealy & Margot Sanger-Katz, *Comparing Gun Deaths by Country: The U.S. is in a Different World*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/14/upshot/compare-these-gun-death-rates-the-us-is-in-a-different-world.html> (comparing gun death rates of the United States and Germany).

no longer serve the symbolic role that the Constitution does today. As is well known, at the time the Constitution was being drafted, Jeremy Bentham argued that to abolish judicial law making, all law should be expressed in a written code enacted by the legislature.<sup>144</sup> He recognized that those who drafted the code could not provide for every eventuality.<sup>145</sup> His solution was that, when faced with a gap in the law, judges should put the case on hold and refer the uncertainty to the legislature for resolution.<sup>146</sup> The impracticality of that solution is apparent. Dependence on regular amendment of the Constitution is not a plausible solution to the problem of judicial discretion. If the options open to the Founders were either to create a society whose structure was largely fixed in the eighteenth century or to create a governmental structure that allowed gradual change to meet unforeseen challenges, it is not at all clear that they would have chosen the former. It is hard to believe that they would have preferred a sclerotic approach to one that left room for the exercise of practical wisdom.

### CONCLUSION

All laws, including constitutions, are means to an end, and hopefully, like moral precepts, that end is to achieve human well-being. That is why the traditional and broader concept of morality, which, following Aristotle and espoused by St. Thomas Aquinas and countless others, refuses to accept that morality can be completely captured by a universe of rights and duties or in a rigid hierarchy of rights.<sup>147</sup> These are only means of achieving a good life and a good society rather than ends in themselves. Because of their generality they, like the law, are always subject to exceptions to accommodate unanticipated circumstances.<sup>148</sup> The fate of the world cannot be based on semantics. It is this feature that makes it impossible for any rule-bound system to achieve complete congruity with all of the dimensions of either the moral or legal universes. It is an illusion of beginning law students that the study of law consists in memorizing rules that can be applied in a syllogistical process that always produces the correct decisions in legal disputes.

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<sup>144</sup> JEREMY BENTHAM, *OF LAWS IN GENERAL* 240 (H.L.A. Hart ed., 1970). This work was probably written around 1782, but discovered in the Bentham papers in University College London and first published in 1945 in an edition entitled *The Limits of Jurisprudence Defined*.

<sup>145</sup> *Id.* at 241.

<sup>146</sup> *Id.*

<sup>147</sup> For a description of this approach, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

<sup>148</sup> See, e.g., ARISTOTLE, *THE NICOMACHEAN ETHICS*, Bk. V, Ch. 10, 1137a–38a (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (describing the difficulty in making universal statements and therefore the importance of the adaptation of rules); 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, PART ONE OF THE SECOND PART, at Q. 97, Art. 1 (Dominican Fathers trans., 1948) (concluding that nothing, including laws, can be unchangeable).

Under the traditional approach, the moral universe is based upon the notion of the good. Thus, it is ultimately based on a set of fundamental goods whose value is universally recognized as necessary for human flourishing, such as, for example, the intrinsic worth of life itself and the human capacity to exercise reason. This is also the ideal goal of the law. All of these fundamental goods are of equal importance<sup>149</sup> because they lead to a society in which people can live a rich and meaningful life. Their achievement, and the accommodation among them when these goods conflict, require the exercise of practical wisdom<sup>150</sup> by those charged with their implementation; that is to say, on the exercise of good judgment and the recognition that the search for the perfect can often lead to the sacrifice of the good. Aquinas expressly accepted that, in the drafting and application of law, one must also take into account the existing customs and opinions of the community, as well as the material needs of the community.<sup>151</sup> This is a precept that cannot totally be ignored in constitutional adjudication.

Admittedly, law, and even some moral precepts, must accept some level of arbitrariness to accommodate the generality of application that makes a complex society capable of functioning in a fair and predictable way. Nevertheless, there must be a limit to arbitrariness that leads to extreme injustice or dangerous policy. A recent classic example is *Pena-Rodriguez v. Colorado*, which involved a prosecution for sexual assault in which the defendant was found guilty.<sup>152</sup> Two jurors signed affidavits stating that one of the jurors “believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”<sup>153</sup> That juror also stated that “I think he did it because he’s Mexican and Mexican men take whatever they want,”<sup>154</sup> and that, in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”<sup>155</sup> Finally, he said he did not find the defendant’s alibi witness credible because he was “an illegal.”<sup>156</sup> Actually, that witness had testified that he was a legal resident of the United States.<sup>157</sup> In a five-to-three decision,

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<sup>149</sup> See, e.g., AQUINAS, *supra* note 148, PART ONE OF THE SECOND PART, at Q. 94, Art. 2 (analyzing that all laws are derived from the same common foundation).

<sup>150</sup> *Id.* PART TWO OF THE SECOND PART, at Q. 47–51 (discussing more extensively the concept of “Prudence”).

<sup>151</sup> *Id.* PART ONE OF THE SECOND PART, at Q. 96, Art. 1. Richard Hooker expressly accepted the same. See Richard Hooker, 1 OF THE LAWES OF ECCLESIASTICAL POLITIE: EIGHT BOOKS 15, § C 2 (William Stansbye ed., 1632) (arguing that the material well-being of human beings is essential if they are to live a virtuous life).

<sup>152</sup> 137 S. Ct. 855 (2017).

<sup>153</sup> *Id.* at 862.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

the Court held that Colorado's absolute juror impeachment rule was, for constitutional reasons, subject to exceptions and remanded the case to the Colorado Supreme Court "for further proceedings not inconsistent" with its opinion.<sup>158</sup> Justice Alito, writing for himself, Chief Justice Roberts, and Justice Thomas, declared that although the Court's decision was "well-intentioned . . . it is questionable whether our system of trial by jury can endure this attempt to perfect it."<sup>159</sup> Justice Thomas went further in declaring that "the Court's holding also cannot be squared with the original understanding of the Sixth or Fourteenth Amendments."<sup>160</sup>

All one can say in conclusion is that there must be some limit to the amount of injustice that a decent legal system can tolerate. It is hard to believe that the Founders would have disagreed.

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<sup>158</sup> *Id.* at 871.

<sup>159</sup> *Id.* at 885 (Alito, J., dissenting). To the extent that that might be true, the horse is out of the barn because, as stated by the majority, seventeen jurisdictions—some for over fifty years—have recognized a "racial-bias exception." *Id.* at 870.

<sup>160</sup> *Id.* at 871 (Thomas, J., dissenting).